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No. 385

In the Supreme Court of the United States

October Term, 1959

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UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC [RAILROAD] COMPANY; and BAMBERGER RAILROAD COMPANY,

Petitioners,

vs.

STRUCTURAL STEEL AND FORGE COMPANY; THE AMERICAN FOUNDRY AND MACHINE COMPANY; ISLAND RANCHING COMPANY; CALVIN L. RAMPTON; and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

o——o——o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

o——o——o

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	6
Statement	6
Reasons For Granting The Writ	9
Conclusion	21
Proof of Service	22

Cases Cited:

Adams Express Co. v. Croninger, 226 U. S. 491	18
Aetna Casualty Co. v. Flowers, 330 U. S. 464	1
Allen v. New York, P. & N. R. Co., 15 F. (2d) 532	19
Atlantic Coast Line v. Florida, 295 U. S. 301	5, 9, 13, 14, 15, 16, 20
Atlantic Coast Line R. Co. v. New York Casualty Co., 57 F. Supp. 31	20
Bernstein Bros. Pipe & Mach. Co. v. Denver & R. G. W. R. Co., 193 F. 2d 441	18
Chicago, M., St. P. & P. R. Co. v. McCree & Co., 91 F. Supp. 57 (D.C. Minn.)	20
Gay v. Ruff, 292 U. S. 25	1
Insurance Company v. Morse, 20 Wall. (87 U. S.) 445 (1874)	12
Louis. & Nash. R. R. Co. v. Rice, 247 U. S. 201	16
Public Service Commission of Utah v. United States, 356 U. S. 421	2, 6, 15
Tennessee v. Davis, 100 U. S. 257	18
Turner Lumber Co. v. C., M. & St. P. Ry., 271 U. S. 259	17
United States v. Corrick, 298 U. S. 435	16
United States v. Morgan, 307 U. S. 183	6
United States v. Morgan, 313 U. S. 409	6
Young & Jones v. Hiawatha Gin & Mfg. Co., 17 F. (2d) 193	20

INDEX—Continued

Page

Statutes Cited:

Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, et seq.:

Section 13(3) 2, 4, 5, 6

Section 13(4) 2, 4, 5, 6, 13, 14, 17, 18, 21

United States Code Annotated, Title 28:

Section 1254(1) 1

Section 1337 ..... 6, 11

Section 1441(a) and (b) 6, 11

Utah Code 1953:

Section 54-3-37 ..... 5, 13

Appendix:

I. Statutory Provisions Involved 23

II. Opinion of the Court of Appeals 26

III. Judgment of the Court of Appeals 34

In the Supreme Court of the United States

October Term, 1959

UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC [RAILROAD] COMPANY; and BAMBERGER RAILROAD COMPANY,

Petitioners,

vs.

STRUCTURAL STEEL AND FORGE COMPANY; THE AMERICAN FOUNDRY AND MACHINE COMPANY; ISLAND RANCHING COMPANY; CALVIN L. RAMPTON; and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on July 8, 1959.

OPINIONS BELOW

The United States District Court of Utah rendered no opinion. The opinion of the Circuit Court of Appeals, not yet reported, is printed in the Appendix *infra*, pp. 26-33.

JURISDICTION

The judgment of the Circuit Court of Appeals, printed in the Appendix, *infra*, p. 34, was entered on July 8, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1). *Gay v. Ruff*, 292 U. S. 25; *Aetna Casualty Co. v. Flowers*, 330 U. S. 464.

QUESTIONS PRESENTED

This Court's decision in *Public Service Commission of Utah v. United States*, 356 U. S. 421, concluded:

> "The judgment of the District Court is reversed and the cause is remanded to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with this opinion."

The District Court had sustained the validity of an order issued by the Interstate Commerce Commission,[1] under Section 13(3) and (4) of the Interstate Commerce Act, requiring petitioners and other Utah railroads to increase their intrastate freight rates in Utah by 15 per cent to remove unlawful discrimination against interstate commerce. The increased rates were in effect from June 22, 1956, until August 27, 1958, when the District Court entered final judgment in conformity with the mandate of this Court, setting the order aside and remanding the cause to the Commission for further proceedings in conformity with the opinion of this Court. Meantime, petitioners had collected from all Utah intrastate shippers, including respondents, some $4,000,000 under the rates as prescribed by the Commission's order. The Commission has conducted and now has pending its decision and order in the further proceedings ordered by this Court.

On August 28, 1958, Thermoid Western Company and four other Utah intrastate shippers brought a class action in the Utah state court against petitioners to recover amounts alleged to have been paid during the time the Commission's order was effective. The complaint alleged that the Commission's order was void; that the rates and charges collected thereunder were "unlawful

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1 The order is set out at pages 130-132 of the Record in this Court, No. 15, October Term, 1957, *Public Service Commission of Utah, et al.* v. *United States, et al.*

and illegal" to the extent they were in excess of rates on file with and approved by the Public Service Commission of Utah, and prayed for judgment in the amounts of the excess. (Transcript of Record, 5-10.)

Petitioners, alleging that the cause of action arose under an Act of Congress regulating commerce, and was a civil action of which United States District Courts have original jurisdiction, removed that action to the same federal District Court which had previously sustained the validity of the Commission's order (Tr. 1). On October 31, 1958, the District Court denied respondents' motion to remand (Tr. 15-16), and granted petitioners' motion to defer trial pending the Commission's final decision and order in the further proceedings ordered by this Court (Tr. 15-16).

Notwithstanding these proceedings and orders of the District Court, the same counsel who had brought the removed Thermoid action brought the instant class action against petitioners on November 10, 1958, in the Utah state court on behalf of respondents herein and other Utah intrastate shippers similarly situated, to recover alleged excessive rates collected under the same Commission order, which the complaint in this action purposely avoided mentioning (Tr. 23-26).

Upon petitioners' supplemental and ancillary petition in the Thermoid case (Tr. 16-23) the District Court issued an injunction restraining respondents and their counsel from prosecuting this action in the Utah state court (Tr. 26). From that injunction respondents appealed to the Circuit Court of Appeals, Tenth Circuit, which held that both complaints stated claims "on which relief can be granted under the laws of the State of Utah"; that the Thermoid case was improperly removed and the District Court was therefore without jurisdic-

tion to issue the injunction; and reversed and remanded the case to the District Court with directions to grant the motion to remand (App., *infra*, pp. 26-33).

The questions presented are:

1. Whether the Court of Appeals erred in holding that the Thermoid case was improperly removed to the federal District Court, and that the court was therefore without jurisdiction to enjoin respondents from prosecuting the instant case in the State court.

2. Whether the Court of Appeals erred in holding that federal jurisdiction was lacking because that court concluded that the complaints "state a claim on which relief can be granted under the laws of the State of Utah."

3. Did the federal District Court, which had upheld the Commission's order, have jurisdiction of claims for restitution of intrastate freight rates prescribed by an order of the Commission under Section 13(3) and (4) of the Interstate Commerce Act, requiring that such rates "shall be observed while in effect * * *, the law of any State or the decision or order of any State authority to the contrary notwithstanding," and were collected by petitioners until the District Court, upon mandate of this Court, set the order aside and remanded the cause to the Commission for further proceedings.

4. Did the claims for restitution of intrastate rates prescribed by and collected in compliance with the Commission's order issued under Section 13(3) and (4) of the Interstate Commerce Act arise under "any Act of Congress regulating commerce."

5. Whether the Court of Appeals erred in holding that "[j]urisdiction wise, our case is wholly unlike"

Atlantic Coast Line v. Florida, 295 U. S. 301, in which this Court asserted jurisdiction and denied identical restitution claims filed in the federal District Court which had upheld the Commission's intrastate rate order.

6. Whether the Court of Appeals erred in holding that the fact that the intrastate rates against which restitution is sought were prescribed by the Commission under the Interstate Commerce Act, Section 13(3) and (4), was irrelevant "as a basis for the charges" sought to be recovered and "was not an essential ingredient of the claims for restitution," and "will not suffice to confer federal court jurisdiction."

7. Whether the Court of Appeals erred in holding that, since the Commission order was later set aside, respondents had "the right" [even while the order was in effect] "not to be required to pay a higher rate on intrastate shipments than that prescribed by applicable state law, rule or regulation."

8. Whether, during the time the Commission's order and the intrastate rates it prescribed were in force and on file with the Utah commission, any Utah law was legally applicable, or any State-approved rates could legally be "on file *and in effect at the time*" (italics added) (Utah Code 1953, section 54-3-7) the Commission-prescribed rates were collected.

9. Whether, to the extent that it based its decision and judgment upon its observation that any final order establishing rates by the Commission in the further proceedings ordered by this Court "may very well be prospective in effect, leaving the subject matter of these actions unsupported by any valid order," the Court of Appeals misconstrued and acted contrary to this Court's decisions in *Atlantic Coast Line v. Florida*, 295 U. S.

301, and *United States v. Morgan*, 307 U. S. 183 and 313 U. S. 409, and, thereupon, erred in ordering the District Court to remand the case to the State court, thus permitting respondents to circumvent effects, potentially adverse to them, of the further Commission proceedings by forcing restitution without awaiting final outcome of those proceedings.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. § 13(3) and (4), and cf. 28 U.S.C.A. § 1337 and 1441(a) and (b) are set out in the Appendix, *infra*, pp. 23-25.

STATEMENT

The controversy of which this petition seeks review emerges in consequence of this Court's decision and mandate in *Pub. Service Comm'n v. United States*, 356 U. S. 421, reversing and directing the United States District Court for the District of Utah to set aside an order of the Interstate Commerce Commission under Section 13(3) and (4) of the Interstate Commerce Act prescribing increased intrastate railroad rates in Utah to remove unjust discrimination against interstate commerce caused by Utah intrastate rates.

The following quotation from the opinion of the Court of Appeals (App., *infra*, pp. 26-33) is a succinct statement of the facts upon which that Court's opinion and judgment are based:

> "This is an appeal from an order of the District Court enjoining appellants, Utah intrastate shippers, from prosecuting a state court class action against appellee railroads, to recover intrastate freight charges paid under an order of the Interstate Commerce Commission, which was ultimately vacated for further proceedings. See Public Service Commission of Utah v. United States, 356 U. S. 421.

"The challenged stay order was entered in a removed action by other shippers similarly situated but with separate and distinct claims. * * *

"The matter is presented on these relevant facts. Pursuant to a proceedings under Section 13(3) (4) of the Interstate Commerce Act, the Interstate Commerce Commission granted a 15 per cent increase in intrastate freight rates to railroads operating in Utah in conformity with the general level of interstate rates over the same routes. See Utah Intrastate Freight Rates & Charges, 297 I. C. C. 87. The Commission's order was sustained by a three-judge court in Public Service Commission of Utah v. United States, 146 F. Supp. 803, and the increased rates were thereupon put into effect. On appeal, however, the rate order was set aside and the cause remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion of the court. Public Service Commission of Utah v. United States, supra. Thermoid Western Company and four other similarly situated intrastate shippers thereupon brought a state court class action against the appellee railroads to recover various amounts alleged to have been paid by them pursuant to and during the time the order of the Interstate Commerce Commission was effective to increase intrastate rates in Utah.

"The complaint alleged the order of the Interstate Commerce Commission increasing intrastate rates in Utah and its ultimate reversal by the Supreme Court on the grounds of insufficiency of the evidence to warrant Interstate Commerce Commission jurisdiction of intrastate rates in Utah. It was then alleged that the order of the Interstate Commerce Commission raising intrastate rates in Utah was void; that any freight rates and charges assessed and collected by the appellee carriers from the plaintiff shippers in intrastate commerce in Utah over and

above those prescribed by the tariff filed with and approved by the Public Service Commission of Utah were unlawful. The plaintiff shippers prayed accordingly.

"The railroad defendants timely removed the action to the United States District Court of Utah on their allegation to the effect that the action arose under an act of Congress regulating commerce, and as such was a civil action or proceedings of which the District Court had original jurisdiction. The motion to remand was denied and the trial of the case was 'continued without date pending outcome of proceedings before the Interstate Commerce Commission.'

"Thereafter the appellant Structural Steel and Forge Company and other similarly situated intrastate shippers, brought the class action in the Utah state court, the prosecution of which was enjoined by the order in the removed Thermoid case, from which this appeal is taken. The suit was against the same railroads to recover rate charges assessed and collected under authority of the vacated order of the Interstate Commerce Commission as in the removed case. Without making any reference to the order of the Interstate Commerce Commission, the complaint merely alleged that the rates charged and collected while the order of the Interstate Commerce Commission was in effect were in excess of those provided in the schedules of the defendant railroads on file with the Public Service Commission of Utah and therefore excessive and illegal, and that the complainants were entitled to recover such excessive charges.

"Without attempting to remove the latter action to the federal court, the railroads in the removed case moved to enjoin the parties from prosecuting the state court action, on the grounds that the attorneys in the removed action had also filed the sub-

sequent class action in the state court and had threatened to file numerous like suits; that said suits were 'unnecessary, vexatious, burdensome, and would cause defendants irreparable damages in expenses they would necessarily have to incur in defending such action, and would circumvent, impair and render futile the jurisdiction of this court in the instant case.'

"Upon statement of counsel, the court seemed to think that the filing of the state court litigation as a class action with an invitation to other parties similarly situated to intervene, was a plan and scheme to frustrate federal court jurisdiction. These considerations apparently prompted the court to enter the challenged injunctive order. At the bar of the court, and by subsequent pleadings, the appellants have waived any defect in service and entered their appearance in the action for the purpose of testing the jurisdiction and propriety of the court to enjoin the state court litigation."

REASONS FOR GRANTING THE WRIT

This case presents, in a new form, claims of shippers for restitution of funds collected by railroads under intrastate freight rates prescribed by order of the Interstate Commerce Commission, between the time a three-judge District Court sustained the order and the time this Court set the order aside and remanded the cause to the Commission for further proceedings, which are still pending final decision and order of the Commission. Such claims heretofore have been made in the same District Court which originally sustained the order, but here, in an apparent effort to escape an adverse decision by this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301, and probable adverse results of the further Commission proceedings, by recovering the funds before those proceedings can be finally concluded, shippers have

filed five suits in the Utah state court.[2] All were removed by petitioners to the District Court except the instant case.

In reversing the District Court's denial of the motion to remand the Thermoid case and its issuance of the injunction in the instant case, the Court of Appeals held (1) that there was no federal jurisdictional basis for removal of the Thermoid case because the complaint "state[s] a claim on which relief can be granted under the laws of the State of Utah"; (2) that the fact that the rates against which restitution was sought were prescribed by order of the Interstate Commerce Commission "was not an essential ingredient of the claim for restitution" and the mention of the order in the complaint did not suffice to confer federal jurisdiction; and (3) that "[j]urisdiction wise, our case is wholly unlike Atlantic Coast Line v. Florida [*supra*], * * * where restitution was sought in a federal court with conceded jurisdiction to review the administrative rate-making process." These holdings conflict with decisions of this Court and other federal courts in an important area of judicial administration. They should be reviewed by this Court.

I.

The holding of the Court of Appeals that the District Court which had previously upheld the Commission's order lacked federal jurisdictional basis for removal of the Thermoid case because the complaint "state[s] a claim on which relief can be granted under the laws of the State of Utah," is so patently erroneous

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Thermoid Western Co., et al.	$ 6,109.14
Structural Steel & Forge Co., et al.	7,257.85
Buehner Block Co.	18,973.83
Columbia Iron Mining Co.	10,553.97
United States Steel Corporation	2,634,739.52
Total	$2,677,634.31

as to be in the very teeth of the statutory jurisdictional and removal provisions, 28 U.S.C.A., §§ 1337 and 1441(a) and (b).[3]

The test of removability is not whether the relief prayed "can be granted" by the State court; instead, it is whether the federal District Court had "original jurisdiction," and Section 1337 expressly confers that jurisdiction of a civil action arising under "any Act of Congress regulating commerce." If the action in the State court is within original jurisdiction of the federal District Court, then, under Section 1441, it (a) "may be removed by the defendant," and, if founded on a claim arising under the Constitution, treaties or laws of the United States, the action (b) "shall be removable without regard to the citizenship or residence of the parties. * * *"

Therefore, contrary to the view of the Court of Appeals, the fact that the relief prayed "can be granted" by the State court can not be made a reason for holding

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3 Removability of the Thermoid case rests upon the following provisions of U.S.C.A., Title 28:

§ 1337. Commerce and anti-trust regulations

The district courts shall have *original jurisdiction* of any civil action or proceeding arising under *any Act of Congress regulating commerce* or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931. (Italics added.)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. (Italics added.)

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or *laws of the United States* shall be removable without regard to the citizenship or residence of the parties. * * * (Italics added.)

that a case was improperly removed. The Court of Appeals cites no decision which supports this holding, and we have found none—undoubtedly because no court heretofore has construed the removal acts as to make them unavailing for removal from State courts because those courts have jurisdiction.

The holding is in square conflict with the language of the removal provisions, and with decisions of this Court from the earliest days. For example, in *Insurance Company v. Morse*, 20 Wall. (87 U.S.) 445, (1874), this Court, speaking of the removal statute, held at page 454:

> "It confers an unqualified and unrestrained right to have the case transferred to the Federal courts upon giving the security required. * * * no power of action thereafter remained in the State court, * * *."

Again at page 458, the Court held that citizens are secured "an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789." And the Court went on to hold that a state statute which obstructed this right was "repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void."

The holding of the Court of Appeals is equally obstructive of the absolute right of removal and repugnant to the statutory provisions conferring the right.

Moreover, the Court of Appeals was further erroneous in holding that the Thermoid complaint stated a claim on which relief "can be granted under the laws of the State of Utah, i. e., the right not to be required to pay a higher rate on intrastate shipments than that prescribed by applicable state law, rule or regulation." It is not that simple.

While the Utah Code, 1953, section 54-3-7, upon which the Thermoid group and respondents purport to base their claims, prohibits a railroad from collecting greater or less or different rates than the rates "specified in its schedules on file and *in effect at the time*" (italics added) the transportation service was performed, the fact is there were no intrastate rates "prescribed by applicable state law, rule or regulation" on file with the Utah commission and "in effect at the time" the service was performed.

The only intrastate rates legally on file and *in effect* during the time restitution is claimed were the rates prescribed by the order of the Interstate Commerce Commission under Section 13(4) of the federal Act. Those were the rates collected and there is no claim that respondents paid greater or different rates. Those rates necessarily superseded, nullified and rendered ineffective any previously applicable Utah law and all rates prescribed by Utah under its laws, rules or regulations, and on file with the Utah commission. Section 13(4) empowers the Commission, upon finding that intrastate rates cause any unjust discrimination against or undue burden upon interstate commerce, to prescribe the rate or charge it deems necessary to remove such discrimination or burden; and then expressly provides that—

> "Such rates * * * shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

This Court held in *Atlantic Coast Line v. Florida*, 295 U. S. 301, 311, that while the Commission's order was in force—

> "The carrier was not at liberty to take the law into its own hands and refuse submission to the order

without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path. See, e. g., Interstate Commerce Act, 49 U.S.C., § 16 (8) (9) (10) (11). Obedience was owing while the order was in force."

Therefore, while the Commission's order was in force, respondents and other Utah shippers had no right to rates made under Utah laws, for State-created rights were suspended and federally created rates, rights and obligations substituted for rights to rates under previously applicable Utah law. Utah laws create no right to restitution of federally made intrastate rates.

II.

The decision of the Court of Appeals conflicts with decisions of this Court and other federal courts, in holding that the fact that the intrastate rates, against which restitution is sought, were prescribed by the Interstate Commerce Commission under an Act of Congress was irrelevant, "was not an essential ingredient to the claim for restitution" and would not suffice to confer federal court jurisdiction.[4]

This holding is in square conflict with this Court's decision in *Atlantic Coast Line v. Florida*, 295 U. S. 301. In that case, as in this, (a) the Commission, under Section 13(4) of the Interstate Commerce Act, ordered increased intrastate rates on logs to remove unjust discrimination against interstate commerce caused by State-approved rates; (b) a three-judge federal court sustained the order and the carrier began collecting the higher

4 This erroneous holding is the logical consequence of the court's earlier error in holding that where a complaint filed in a State court states a claim on which relief can be granted under the laws of the State, there is no jurisdictional basis for removal to a federal court.

Commission-prescribed intrastate rates; (c) on appeal this Court, holding that the part of the order relating to unjust discrimination against interstate commerce was not supported by adequate findings and "must be set aside," reversed the District Court.[5]

After the District Court set aside the order and the State-approved rates were restored, the shippers petitioned the District Court for a "decree of restitution" of the difference between the higher rates paid under the Commission order and the lower State-approved rates that would have been paid if there had been no Commission order.

The District Court refused restitution on the basis claimed, but ordered restitution to the extent of 34% of the amount claimed (295 U. S. 308). This Court reversed and ordered the District Court to dismiss the claims.

The case was argued twice in this Court, the reargument being called by the Court upon the following questions (295 U. S. 304):

> "(1) Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates. (2) If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what

5 In neither the *Florida* case nor the instant case did the Court hold the order "void." In the *Florida* case the Court merely held that the order must be set aside and did not order the cause remanded to the Commission. In the instant case the Court not only directed the District Court to set the order aside but to "remand the cause to the Commission for further proceedings in conformity with this opinion" (356 U.S. 429). The Commission has conducted the further proceedings which are now pending decision and order by the Commission.

should be the measure of an award of restitution. And (3) In such an inquiry, what effect, evidentiary or otherwise, should be attributed to the proceedings before, and findings of, the Interstate Commerce Commission."

Thus, after calling for reargument on the specific question whether the District Court had jurisdiction, this Court, after discussing at length the merits of the restitution claims and holding that they should have been rejected altogether, reversed and remanded the case with instructions to dismiss the claims. Therefore, it must be presumed that this Court was of opinion that the District Court had jurisdiction of the restitution claims (see *United States v. Corrick*, 298 U. S. 435, 440). Although the further Commission proceedings ordered by the remand of this Court in the instant case have not yet been finally concluded, as they had been in the *Florida* case (295 U. S. 307) before this Court rejected the restitution claims, and no removal from a State court was involved in that case, we submit that this Court's decision on those claims necessarily sustains the jurisdiction of the District Court in this case, which previously upheld the Commission's order, to entertain and adjudicate the restitution claims upon removal, and that therefore the Court of Appeals was wrong in holding that "[j]urisdiction wise, our case is wholly unlike Atlantic Coast Line v. Florida". (App., *infra*, p. 32.)

In holding that the fact that the intrastate rates were prescribed under an Act of Congress was not an ingredient of the restitution claims and did not confer federal jurisdiction, the decision of the Court of Appeals is also in conflict with this Court's decision in *Louis. & Nash. R. R. Co. v. Rice*, 247 U. S. 201, in which the railroad sued in the United States District Court to recover charges published as required by the Interstate Commerce Act for disinfecting cars in which livestock was

shipped from points outside of Louisiana to New Orleans. The District Court dismissed the suit for want of jurisdiction. This Court reversed, holding at page 202:

> "Section 24 of the Judicial Code provides that regardless of amount involved District Courts shall have original jurisdiction 'of all suits and proceedings arising under any law regulating commerce.' The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. *Their duty and obligation grow out of and depend upon that act.*" (Italics added.)

At page 203 the Court further held:

> "The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved as required by Interstate Commerce Act; *result of the action necessarily depended upon construction and effect of that act.* (Italics added.)
>
> "We think the District Court had jurisdiction."

In *Turner Lumber Co. v. C., M. & St. P. Ry.*, 271 U. S. 259, 261, this Court held that a federal district court had jurisdiction of a suit to recover $40.00 demurrage on a car containing an interstate shipment, despite the small amount, "because the suit arises under a law regulating commerce. * * *"

The fact that the amounts sought to be recovered in the Thermoid case and the instant case were collected for *intrastate* rather than interstate transportation services does not oust the District Court's jurisdiction, since Section 13(4) of the Interstate Commerce Act expressly empowers the Commission to exercise federal jurisdiction over intrastate freight rates and thus undeniably to "regulate" *intrastate* commerce. It can not be denied that the Interstate Commerce Act is an Act of Congress

regulating commerce or that it empowers the Commission to prescribe intrastate rates in order to prevent unjust discrimination against interstate commerce. Section 13(4) of that Act regulates *intrastate* commerce, and when that power is exerted by the Commission, like the federal bills of lading act, it "supersedes all the regulations and policies of a particular State upon the same subject," *Adams Express Co. v. Croninger*, 226 U. S. 491, 505.

The federal nature of the instant controversy derives from the fact that the amounts sought to be recovered were collected under rates prescribed by federal authority under an Act of Congress regulating commerce. Eighty years ago this Court held in *Tennessee v. Davis*, 100 U. S. 257, at page 264:

> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted."

The intrastate rates that are the sole cause of the controversy here "grow out of the legislation of Congress." They did not "grow out of" Utah law, nor do Utah laws create any restitution rights or other remedies with respect to intrastate rates prescribed by the Commission under "the legislation of Congress".

This federal jurisdictional consequence of the prescription of rates by federal authority was heretofore fully understood by the same Circuit Court of Appeals whose decision we seek to have reviewed by this Court. In *Bernstein Bros. Pipe & Mach. Co. v. Denver & R. G. W. R. Co.*, 193 F. 2d 441, that court sustained the jurisdiction of a District Court of an action by the railroad for additional transportation charges on interstate shipments, saying at page 444:

"It has been established since the decision of the Supreme Court in Louisville & N. R. R. Co. v. Rice, 247 U. S. 201, 202, 203, 38 S. Ct. 429, 62 L. Ed. 1071, that a suit to recover a freight undercharge arises under a law regulating commerce, since the duty to pay and the right and obligation to collect grow out of and depend upon the Interstate Commerce Act.

* * * * *

"Here, since the obligation to pay and the right and duty to collect arises solely by virtue of §§ 3(2) and 6(7), supra, of the Interstate Commerce Act, the cause of action sought to be enforced is created by and arises out of an Act of Congress regulating commerce.

"A tariff, so long as it is enforced, is, in respect to the rates named, to be treated as though it were a statute binding upon the carrier and shipper alike. Every question of the construction of an interstate tariff is a question of Federal law."

In *Allen v. New York, P. & N. R. Co.*, 15 F. (2d) 532, the Fourth Circuit Court of Appeals sustained the District Court in denying a motion to remand to a State court an action to recover payments by shippers alleged to be in excess of interstate charges authorized by the railroad tariffs. At page 533 the court held—

"* * * In the cases at bar, the shippers must recover, if at all, upon the rights given them by certain acts of Congress and proceedings of the Interstate Commerce Commission authorized thereby. It does not help the shipper that, had there been no such acts or proceedings, they could at common law have recovered from a common carrier any sums which had been unlawfully extorted from them; for in the cases which they now present the question whether there was any extortion, and, if so, how much, depends altogether upon the construction of the federally prescribed tariffs."

Federal jurisdiction of a suit for demurrage charges prescribed by the Interstate Commerce Commission on *intrastate* shipments was sustained in *Chicago, M., St. P. & P. R. Co. v. McCree & Co.*, 91 F. Supp. 57 (D. C. Minn.).

But for the fact that the rates against which restitution is sought were prescribed by the federal Commission under an Act of Congress there would be no controversy here, *Atlantic Coast Line R. Co. v. New York Casualty Co.*, 57 F. Supp. 31; and in testing the jurisdiction of the District Court, "[i]t is immaterial what rights the plaintiffs have at common law or by state statute," *Young & Jones v. Hiawatha Gin & Mfg. Co.*, 17 F. (2d) 193, 195.

III.

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court. While this Court's decision in *Atlantic Coast Line v. Florida*, supra, sustains the jurisdiction of a three-judge district court, which has upheld a Commission intrastate rate order, to adjudicate restitution claims *filed in that Court*, the decision does not consider or settle the question here (a) whether a federal district court which has upheld a Commission order prescribing intrastate rates has jurisdiction of restitution claims filed in a State court and removed to the district court, or the question (b) whether such restitution claims filed in a State court may not be removed to the federal district court which has upheld the Commission's order because the complaint states a claim on which the relief prayed "can be granted" by the State court in which the action was filed.

These questions are important not only to the parties in this case but also to railroads and shippers generally, particularly in view of the number of Commission orders

under Section 13(4) that are reviewed by the courts.[6] It is also of importance that these questions be settled by this Court because they involve an important area of judicial administration.

CONCLUSION

For the reasons above stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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6 See cases discussed in the opinion dissenting from the majority decision from which the instant controversy emerges. *Pub. Service Comm'n* v. *United States*, 356 U.S. 421, 429-463.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on 9th day of September, 1959, I served, on behalf of all petitioners herein, the foregoing petition on the adverse parties by mailing copies in a duly addressed envelope with air-mail postage prepaid to their counsel:

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